



No. 83-479

In the Supreme Court of the United States

OCTOBER TERM, 1983

TCHONG TCHENG KAN, PETITIONER

v.

**MICHAEL LANDON, IMMIGRATION AND
NATURALIZATION SERVICE**

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT**

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner, who voluntarily left mainland China in 1946, was properly denied refugee status under 8 U.S.C. (1976 ed) 1153(a)(7) (repealed 1980) on the ground that he had not "fled" from a Communist or Communist-dominated area or country.

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. A1-A2) and the Immigration and Naturalization Service's regional commissioner (*id.* at C1-C7) and district director (*id.* at D1-D3) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 1983. The petition for a writ of certiorari was filed on September 19, 1983. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTES INVOLVED

1. 8 U.S.C. (1976 ed.) 1153(a)(7) (repealed 1980) provided in pertinent part:

(1)

Conditional entries shall next be made available by the Attorney General, pursuant to such regulations as he may prescribe * * * to aliens who satisfy an Immigration and Naturalization Service officer at an examination in any non-Communist or non-Communist-dominated country, (A) that (i) because of persecution or fear of persecution on account of race, religion, or political opinion they have fled (I) from any Communist or Communist-dominated country or area * * * and (ii) are unable or unwilling to return to such country or area on account of race, religion, or political opinion, and (iii) are not nationals of the countries or areas in which their application for conditional entry is made[.]

2. As amended by the Refugee Act of 1980, 8 U.S.C. 1158(a) provides:

The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

3. 8 U.S.C. 1101(a)(42)(A) provides in pertinent part:

The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion * * *.

STATEMENT

Petitioner contends that he was improperly denied classification as a refugee under 8 U.S.C. (1976 ed.) 1153(a)(7) (repealed 1980).

1. Petitioner was born in China in 1921. He voluntarily left in 1946 to accept employment in a bank in Haiphong, Vietnam. In 1951, his father and brother were executed by the government of the People's Republic of China, allegedly on the ground that they were landlords. In February 1951, petitioner moved from Haiphong to Saigon, allegedly because of the war in Indochina and fear of a Communist takeover in the north. In June 1970, he left Vietnam on a five-year visa to become chief adviser to the National Bank of Rwanda. Petitioner claims that his departure was motivated by fear that Communists would come to power in South Vietnam. In July 1975, he entered the United States as a nonimmigrant business visitor. Petitioner contends that he has remained outside China due to fear of political persecution. See Pet. App. C3-C5, D1-D2.

2. In 1978, petitioner applied to the Immigration and Naturalization Service seeking status as a permanent resident and classification as a refugee under former 8 U.S.C. (1976 ed.) 1153(a)(7). In order to obtain classification as a refugee under that provision, an alien was required to have "fled * * * from any Communist or Communist-dominated country or area * * *." In addition, the alien was required to show that he was "unable or unwilling to return to such country or area on account of race, religion, or political opinion." The INS district director held (Pet. App. D2-D3) that petitioner had failed to satisfy these requirements. The director noted (*id.* at D2) that petitioner had not fled China but had left voluntarily. The director also found (*ibid.*) that petitioner had not established that he was unable or unwilling to return to China due to fear of political persecution.

3. The regional commissioner affirmed (Pet. App. C1-C7). He held (*id.* at C4-C5) that petitioner had failed to prove either that he "fled" from China or Vietnam or that he was unable or unwilling to return to mainland China due to fear of political persecution. While noting the execution of petitioner's father and brother, the commissioner observed (*id.* at C5-C6) that other members of petitioner's family were still in mainland China and that there was no evidence that the Chinese government had singled out petitioner for punitive treatment.

4. Petitioner then filed suit in the United States District Court for the Central District of California, seeking a declaratory judgment that he was entitled to refugee status. The district court granted summary judgment for the INS (Pet. App. B1), and the court of appeals affirmed (*id.* at A1-A2). The court of appeals held (*id.* at A2) that petitioner had not "fled" from a Communist country within the meaning of former 8 U.S.C. (1976 ed.) 1153(a)(7), as interpreted in *Rosenberg v. Yee Chien Woo*, 402 U.S. 49, 55-57 (1971), and that petitioner had failed to prove a reasonable fear of persecution, since his only proof related to events that occurred in 1951 and since there was no proof that his other relatives in China were being persecuted.

ARGUMENT

The decision below is directly supported by a decision of this Court. Moreover, the question raised by petitioner is of little continuing importance due to the repeal in 1980 of the statutory requirement in question. Indeed, there are procedures under which petitioner may now seek the benefit of the new law.

1. Petitioner's sole argument is that under former 8 U.S.C. (1976 ed.) 1153(a)(7), an alien who voluntarily left his native country but later decided not to return due to events occurring at home after his departure should be

deemed to have "fled" from his country. However, in *Rosenberg v. Yee Chien Woo*, *supra*, this Court held that an alien was not entitled to asylum unless his physical presence in this country "is reasonably proximate to the flight and not one following a flight remote in point of time or interrupted by intervening residence in a third country reasonably constituting a termination of the original flight in search of refuge." (402 U.S. at 57) (footnote omitted). See also *Chinese American Civic Council v. Attorney General*, 566 F.2d 321 (D.C. Cir. 1977); *Shubash v. District Director*, 450 F.2d 345 (9th Cir. 1971); *Kai Fung Chan v. Kiley*, 454 F.Supp. 34 (S.D.N.Y. 1978); *Ishak v. District Director*, 432 F.Supp. 624 (N.D. Ill. 1977).

2. In any event, the requirement of flight was deleted in 1980 (see 8 U.S.C. 1101(a)(42)(A), 1158). An alien may now seek asylum if he is "outside any country of [his] nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided" (8 U.S.C. 1101(a)(42)(A)). Because of this amendment, the issue raised by petitioner is of little importance.

3. Petitioner may seek to remain in this country or avoid deportation to China by several means. He may apply to a district director for political asylum under the new law. If his application is denied, he may renew his request in deportation proceedings before an immigration judge (8 C.F.R. 208.9) and seek withholding of deportation under (8 U.S.C. 1253(h)(1)). In deportation proceedings, petitioner could also apply for suspension of deportation under 8 U.S.C. 1254(a). By applying for any of these alternative forms of relief, petitioner would receive a full administrative determination of the merits of each of his claims and would be entitled to judicial review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1983